

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
MCLEODUSA)	
TELECOMMUNICATIONS SERVICES,)	
INC.)	
)	
Petition for Preemption of Nebraska)	CC Docket No. 98-84
Public Service Commission Decision)	
Permitting Withdrawal of Centrex Plus)	
Service by U S WEST Communications,)	
Inc.)	

REPLY COMMENTS OF U S WEST COMMUNICATIONS, INC.

U S WEST Communications, Inc. ("U S WEST") hereby submits its reply comments in the above-captioned proceeding in response to the Federal Communications Commission's ("Commission") Public Notice of September 3, 1998.¹

The case involves a complaint by McLeod before the Nebraska Public Service Commission ("PSC") to the effect that the Nebraska PSC had acted anti-competitively and unlawfully when it rejected McLeod's demand that U S WEST be required to continue to offer its Centrex Plus product against its will. The Public Notice itself was occasioned by U S WEST's filing a decision of the Nebraska

¹ Public Notice, Pleading Cycle Established for Comments on U S WEST's Ex Parte Submission Concerning the Petition for Preemption, Declaratory Ruling, and Injunctive Relief filed by McLeodUSA Telecommunications Services, Inc., CC Docket No. 98-84, DA 98-1792, rel. Sep. 3, 1998. Comments filed on Sep. 24, 1998 by U S WEST, McLeodUSA Telecommunications Services, Inc. ("McLeod"), Competitive Telecommunications Association ("CompTel") and Competition Policy Institute ("CPI").

Supreme Court dismissing the appeals of that decision by McLeod and others and vacating the PSC's decision because McLeod lacked standing to either file the complaint or appeal its unfavorable resolution.² The cause of McLeod's lack of standing is nothing more complex than the fact that McLeod was not authorized to provide local service in Nebraska at the time it filed its complaint or its appeal, and consequently McLeod could point only to conjectural harm. McLeod accordingly lacked legal standing to prosecute its complaint.

Hence, the matter would really appear to be quite simple. At the present time, there is no Nebraska PSC order, or any other Nebraska statute, regulation or order of any sort for the Commission to preempt under Section 253(d) of the 1996 Telecommunications Act (the "Act"). The reason for this situation -- one which McLeod and similar commentators find quite lamentable -- is equally simple. McLeod failed to take the elementary legal steps to protect its rights essential to confer legal standing. This failure was entirely the fault of McLeod.³ McLeod now finds itself in the position of contending that U S WEST should be required to re-initiate a service which it does not offer in order that McLeod can resell what does not now exist. Clearly nothing in the Act contemplates vesting the power to demand such extraordinary action in this Commission. McLeod's efforts to turn its rudimentary

² In re Complaints of McLeod Telemanagement, Inc., et al. Against U S West Communications, Inc., No. S-97-112 (NE. S. Ct., Aug. 14, 1998).

³ CompTel highlights the fundamental silliness of McLeod's position when it alleges that "McLeodUSA properly availed itself of remedies available under state law. . . ." CompTel at 2. Of course, had McLeod "properly" availed itself of its lawful Nebraska remedies, the Nebraska Supreme Court would not have ruled to the precise contrary.

legal error into a reason for this Commission to declare the standing rules of the Nebraska Supreme Court unlawful bear some brief analysis.⁴

Perhaps the most extreme argument made by McLeod and its supporters is the contention that legal requirements such as standing should be of no interest to this Commission and of no relevance to a determination of the Commission's proper action and analysis when faced with a request that a state regulatory action be preempted as anticompetitive under Section 253(c) of the Act.⁵ CPI contends that "[a] requirement that petitioners must be directly harmed by the offending statute or ordinance could defeat the purposes of section 253."⁶ McLeod and CompTel actually argue that the fact that McLeod did not file a legally cognizable complaint at the Nebraska PSC provides a reason for Commission preemption at this time, contending that waiting for an actual case or controversy to arise would needlessly delay resolution of an issue which they contend (with the notable absence of factual

⁴ McLeod and the other commentators contend initially that it is now impossible for McLeod to seek relief from the Nebraska PSC and the Nebraska courts (McLeod at 3-4; CompTel at 3, 6; CPI at 2). As a legal matter, this allegation is not true. If McLeod were to obtain the proper certificate to provide local telecommunications services in Nebraska, it would then, under the terms of the Nebraska Supreme Court decision, have standing to file a complaint with the PSC. Contrary to the contention of McLeod, Nebraska Rev. Stat. Section 86-803(3) has nothing to do with the issue of McLeod's ability to bring a complaint. That statute deals only with complaints signed by telephone subscribers who object to increases in their basic local exchange rates. The Section has no bearing on complaints of any other kind. However, U S WEST would, of course, vigorously oppose any effort to bring a complaint of this nature.

⁵ See McLeod at 2, 4; CompTel at 2, 6, 7; CPI at 2.

⁶ CPI at 2.

support) is crucial to competition.⁷ But this is a patently untenable position.

McLeod and its supporters want nothing less than for this Commission to preempt the laws of a sovereign state without the state having first had the opportunity to consider the issue itself. In other words, McLeod, et al., want this Commission to preempt an order which they anticipate the state of Nebraska will issue should McLeod ever get its legal act together sufficiently to file a procedurally acceptable complaint or other document sufficient to actually obtain a formal Nebraska PSC ruling. Speculation of this sort can hardly justify preemption of state regulatory authority over intrastate services offered by U S WEST.

Of course, not surprisingly, McLeod, et al., rely on the argument routinely put forth by competitors when their positions find no support in law or logic: they contend, with predictable lack of anything other than loud rhetoric, that U S WEST's legitimate business actions are "anticompetitive."⁸ We understand that McLeod might want to resell U S WEST's services rather than construct its own facilities or resell the services of another local exchange carrier ("LEC"). It is permitted to do so under Sections 251(b)(1) and 251(c)(4) of the Act. But resale entails U S WEST services which actually exist, and there is nothing in the Act which permits the Commission to direct that an incumbent LEC offer a service involuntarily so that a competitor can resell it.

⁷ CompTel at 4, 6; McLeod at 2, 4.

⁸ CompTel at 5; McLeod at 2.

The McLeod complaint should be dismissed.

Respectfully submitted,

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October 5, 1998

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that on this 5th day of October, 1998, I have caused a copy of the foregoing **REPLY COMMENTS OF U S WEST COMMUNICATIONS, INC.*** to be served, via first class United States Mail, postage pre-paid, upon the persons listed on the attached service list.

Richard Grozier

Richard Grozier

*This document was filed electronically via the FCC's Electronic Comment Filing System. Therefore, pursuant to paragraph 30 of the April 6, 1998 Report and Order in GC Docket No. 97-113 (and the attached rules, which were effective June 30, 1998) and the September 3, 1998 Public Notice in CC Docket No. 98-84, DA 98-1792, no additional hard or electronic copies of this filing were provided to FCC staff and ITS.

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